UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY INTERVENTIONAL RADIOLOGY AND IMAGING CENTER	:	31-RM-209388
and	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR FOR REGION 31's JANUARY 12, 2018 PARTIAL DECISION ON OBJECTIONS AND MARCH 14, 2018 DECISION AND CERTIFICATION OF REPRESENTATIVE

Kaitlin A. Kaseta, Esq.
Counsel for the Employer
415 King Street
Mount Pleasant, SC 29464
(860) 307-3223
(843) 284-9684
kkaseta@carmodyandcarmody.com

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By and through the Undersigned Counsel, RadNet Management, Inc. d/b/a San Fernando Valley Radiology and Imaging Center (hereafter, the "Employer") hereby submits this Request for Review of the January 12, 2018 Partial Decision on Objections (hereafter, the "Partial Decision") and March 14, 2018 Decision and Certification of Representative (hereafter, the "Certification Decision") issued in the above-referenced case by Regional Director Mori Rubin (hereafter, the "Regional Director").

Summary of Proceedings

The Election & The Employer's Objections

On December 6, 2018, an election was held at the Employer's facility in Encino, California during which technical employees voted as to whether or not they wished to be represented for purposes of collective bargaining by the National Union of Healthcare Workers (hereafter, the "Union"). Partial Decision 1.[1] Of approximately six eligible voters, six employees cast ballots in the election, with

[1] References to the Employer's Objections shall be indicated "Objections ___." References to the Employer's Offer of Proof in support of Objections shall be indicated "Offer of Proof ___". References to the Regional Director's January 12, 2018 Partial Decision shall be indicated "Partial Decision ___". References to exhibits from the hearing on Employer's Objection No. 2 shall be indicated as "E. Ex. ___" and "GC Ex. ___". References to the transcript from the hearing on Objection No. 2 shall be indicated as "Tr. ___". References to the Hearing Officer's Report and Recommendations on Objections shall be indicated as "Report ____". References to the Employer's Brief in Support of Exceptions, to the Hearing Officer's Report and Recommendations on Objections shall be indicated "Exceptions ___". References to the Regional Director's March 14, 2018 Certification Decision shall be indicated as "Certification Decision ___".

two employees voting against representation by the Union and four employees voting for representation by the Union. Partial Decision 1. On December 13, 2017, the Employer filed timely Objections to the conduct of the election and conduct affecting the results of the election (hereafter, the "Objections") with Region 31 (hereafter, the "Region") of the National Labor Relations Board (hereafter, the "Board"), accompanied by an Offer of Proof filed the same day (hereafter, the "Offer of Proof"). Objections; Offer of Proof. [2]

The Regional Director's Partial Decision

Thereafter, on January 12, 2018, the Regional Director issued her Partial Decision, overruling all of the Employer's objections to the election, except for

[2] Specifically, the Employer alleged that the results of the December 6, 2017 election should be overturned, because: (1) The Union had failed to disclose to eligible voters, and thus materially misrepresented, the Union's affiliation with the International Association of Machinists and Aerospace Workers (hereafter, the "IAMAW"); (2) The Union and/or IAMAW had harassed eligible voters by its involvement in the filing of false police reports against facilities operated by RadNet Management, Inc.; (3) The Board Agent erred by failing and / or refusing to designate and police a "no electioneering zone" at the polling place during the election; (4) The Board Agent erred by misrepresenting to the one voter who voted in the election subject to challenge that his ballot would, in all circumstances, remain a secret ballot; (5) The Board Agent erred by permitting the Union's observer to utilize a writing implement while the polls were open to make marks on and in written materials during the polling period; (6) The Board erred by conducting an election in a unit where the Union had failed to disclose its affiliation with IAMAW; (7) The Board conducted the election in violation of Section 9(b)(3) of the National Labor Relations Act (hereafter, the "Act"); and (8) The Board erred by conducting the election pursuant to the Board's revised elections rules, which violate the Act, the Administrative Procedure Act, and public policy considerations. See Objections.

Objection No. 2, which was set for hearing on January 29, 2018. Partial Decision 1. With regard to Objection No. 1, concerning the Union's failure to disclose its affiliation with the IAMAW to eligible voters, the Regional Director held that the Employer's offer was "insufficient to establish an affiliation between the Union and the IAMAW", but further stated that, even if the Employer had established the affiliation, the affiliation would not be sufficient to set aside the election without "evidence of forgery or the misuse of the Board's election process." Partial Decision 2. The Regional Director further held that there was no evidence of employee confusion over the identity of the organization seeking representative status, and therefore, in sum, no grounds upon which to sustain Objection No. 1. Partial Decision 2. The Regional Director's Partial Decision also overruled Objection No. 6, which alleged that the Board had erred by conducting an election where the Union had failed to disclose its affiliation with the IAMAW to employees, relying upon the same rationales expressed by the Partial Decision in response to Objection No. 1. Partial Decision 7.

In connection with Objection No. 3, which alleged that the Board Agent conducting the election had erred by failing and/or refusing to designate and police a "no electioneering zone" at the polling place during the election, the Regional Director held that, because the Employer did not allege "unlawful electioneering" had occurred as a result of the Board Agent's error in its Offer of Proof, Objection

No. 3 should be overruled. Partial Decision 4. Similarly, the Regional Director overruled Objection No. 4, which alleged that the Board Agent erred by misrepresenting the challenged ballot process to the one employee who voted subject to challenge, on the grounds that the "procedural irregularity" did not "raise reasonable doubt" as to the "fairness and validity" of the election. Partial Decision 5. The Regional Director additionally opined that the Employer's proffered evidence in support of Objection No. 4 did not demonstrate that the "integrity of the voting process" or the "results of the election" had been affected. Partial Decision 5. The Partial Decision next addressed Objection No. 5, which alleged that the Board Agent conducting the election erred by permitting the Union's election observer to utilize a writing implement to make marks in written materials while the polls were open. Partial Decision 6. The Regional Director held that, because the Employer's Offer of Proof did not conclusively prove whether the Union's observer actually kept a list of employee names, or whether employees knew their names were potentially being recorded by the Union's election observer, Objection No. 5 should be overruled. Partial Decision 6.

The Regional Director's Partial Decision also overruled Employer's Objection No. 7, which alleged that the Board had erred by conducting an election in violation of Section 9(b)(3) of the Act. Partial Decision 9. In connection with Objection No. 7, the Regional Director held that the Employer had failed to object

previously to the inclusion of MRI Technologists and Multi-Modality Technologists, who the Employer alleged were "guards" pursuant to Section 9(b)(3) of the Act, and thus overruled Objection No. 7. Partial Decision 7. However, the Partial Decision went on to hold that, even if the Employer had properly raised the allegations underlying Objection No. 7, the Employer's evidence of the employees' status as guards illustrated that their guard duties were "incidental", and thus insufficient to set aside the election. Partial Decision 7-9. The Regional Director also held that the Employer's Offer of Proof with regard to the employees' guard duties lacked "specificity", and faulted the Offer of Proof for not soliciting evidence from an employee serving as a MRI Technologist or Multi-Modality Technologist. Partial Decision 8. Finally, the Regional Director held that the Employer had not proffered any evidence of "conflicting loyalties during a period of industrial unrest and strikes", and for all these additional reasons, overruled Objection No. 7. Partial Decision 9.

The Partial Decision next addressed and overruled Employer's Objection No. 8, which alleged that the Board had erred by conducting the election pursuant to the Board's revised election rules, which the Employer alleged violated the Act, the Administrative Procedure Act, and public policy considerations underlying a number of other federal statutes. Partial Decision 9. The Regional Director held that, because the election had been conducted pursuant to a Stipulated Election

Agreement, the Employer had waived its right to raise an objection to the Board's revised election rules. Partial Decision 9. Furthermore, the Regional Director held that, because the Employer's challenges to the Board's revised election rules had previously "been successfully litigated to conclusion by the Agency in federal court" and "fully answered in the Board's justification for the Final Rule", Objection No. should be overruled. Partial Decision 10.

Finally, with regard to Objection No. 2, which alleged that the Union and / or the IAMAW's involvement during the election campaign in the filing of false police reports against facilities and employees of RadNet Management, Inc., the Regional Director set the Objection for hearing. Partial Decision 10. The Regional Director noted the Employer's intent "to issue subpoenas to the Union in order to present further documentary evidence showing the Union's involvement with these false police reports and intends to present information it has requested from the LAPD. Partial Decision 3. The Regional Director held that, although "the Employer presented no evidence to establish that the Union and its agents were responsible for the alleged filing of these police reports", "the question of whether the alleged filing of police reports against individuals who refused to support and / or communicate with the Union was 'so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible' […] raises substantial and material issues of fact that can best be resolved on the basis

of record testimony taken at hearing." Partial Decision 4. Accordingly, the Regional Director ordered that a hearing be held "for the purpose of receiving evidence to resolve the issues raised by Objection 2", and ordered that, at the hearing, the parties would "have the right to appear in person to give testimony, and to examine and cross-examine witnesses." Partial Decision 10. [3]

The Hearing on Objection No. 2

Thereafter, pursuant to the Regional Director's rulings, a hearing on Employer's Objection No. 2 was convened on January 29-30, 2018. Report 2. Prior to the hearing, the Employer served subpoenas on the Union, Sophia Mendoza (an employee of the Union), IAMAW District Lodge 725, Ryan Carrillo (an employee of IAMAW), and the LAPD. E. Exs. 1-4. The Employer's subpoenas sought information in relevant to Objection No. 2, including information about the identity of the filers of certain police reports that involved employees of RadNet Management, Inc., contact between the Union, the IAMAW, Mendoza, and / or Carrillo and the LAPD during the Union's organizing campaign, and any communications between the eligible voters of the Employer and the

[3] Concurrent with the Partial Decision, the Regional Director also issued an Order Consolidating Hearings on Objections and Notice of Hearing, which consolidated the instant case for hearing with Case No. 31-RM-209388, which involved the same Union and RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center. Report 2.

Union, the IAMAW, Mendoza, and / or Carrillo about police reports during the Union's organizing campaign. E. Exs. 1, 3, 4.

During the hearing on January 29, 2018, the Union provided the Employer with documents responsive to the subpoenas issued to the Union's Custodian of Records and Mendoza, including a list of Union employees and volunteers who worked on the Union's organizing campaign.[4] Tr. 22, 109, 114, 118, 51-57, 90, 149; E. Ex. 5. No representatives of the IAMAW, Carrillo, or the LAPD appeared at the hearing, nor had any of the subpoenaed parties filed any petition to revoke the subpoenas that had been served upon them at the time the record was closed by the Hearing Officer on January 30, 2018. Tr. 7, 11, 12, 42. The Hearing Officer sought, and counsel for the Employer provided, multiple offers of proof on the record, illustrating that the evidence sought by the subpoenas issued to IAMAW, Carrillo, and the LAPD was not only relevant, but in fact necessary, for the Employer to proceed with its case. Tr. 12-13, 17, 19, 121, 125-126, 33-34, 35, 38-41, 48. Specifically, the Employer explained that the evidence sought by the Employer's subpoenas would illustrate the impact of reports filed with the LAPD on the employees of the Employer, either because those employees themselves were the subject of police reports, or because those employees had heard about

[4] The Union objected to the provision of the names of employees in response to a request for the names of any individuals who had assisted the Union with its organizing campaign, and the Union's objection was sustained by the Hearing Officer. Tr. 110-111, 57-58, 146-147.

police reports being filed from the Union or one of its agents. Tr. 12-13, 17, 19, 121, 125-126, 33-34, 35, 38-41, 48.

Despite having previously acknowledged that she was without authority to rule upon the Employer's subpoenas, due to the fact that no petitions to revoke had been filed by the subpoenaed parties, the Hearing Officer stated that the Board's authority to enforce the Employer's subpoenas effectively gave the Region and the Hearing Officer the ability rule upon the relevance of the Employer's outstanding subpoenas. Tr. 15, 30, 44-46, 150-152. Pursuant to this logic, the Hearing Officer took the position that, because the Region would not enforce the Employer's subpoenas, the subpoenas were effectively quashed, and the Employer would not be entitled to receive documents in response to its subpoenas. Tr. 15, 30, 44-46, 150-152. The Hearing Officer's position was taken over the strong and repeated objection of Counsel for the Employer. Tr. 42-43, 44-46.

Thereafter, the Employer called Mendoza, to question her about her response, and the Union's response, to the Employer's subpoenas, as well as about the Union's relationship with the IAMAW. Tr. 60-79. During her testimony, Mendoza represented that she, as Custodian of the Records for the Union, had not personally undertaken a search for the documents requested by the Employer's subpoena duces tecum, but rather had contacted certain individuals employed by the Union, and / or who had worked with the Union on its organizing campaign

(including Carrillo), and asked them to independently search their records for responsive documents. Tr. 67-69, 74. Mendoza testified that she did not instruct those individuals to check their personal emails or cell phones for documents responsive to the Employer's subpoena duces tecum. Tr. 68. Mendoza also explained that, beyond the individuals she had contacted in response to the Employer's subpoenas, there were two volunteers, named Pete Clayton and Joe Solis, who had attended some of the Union's early organizing meetings. Tr. 71-72. Mendoza testified that she did not ask these individuals to review their records in response to the Employer's subpoena duces tecum. Tr. 72.

As a result of Mendoza's testimony, as well as Mendoza and the Union's responses to the Employer's subpoenas, Counsel for the Employer requested additional subpoenas from the Region. Tr. 32, 59-60, 79, 82-83, 93-95. Thereafter, based upon the Employer's articulated desire to serve additional subpoenas upon parties unknown to the Employer before the first day of hearing, as well as upon the basis of the outstanding subpoenas to which Carrillo, the LAPD, and the IAMAW had not yet responded, the Employer took the position at the end of the first day of hearing that the record should remain open for the receipt of additional evidence in response to the Employer's subpoenas. Tr. 85. The Hearing Officer agreed with counsel for the Employer, and scheduled the hearing to continue the next day. Tr. 86, 102.

On January 30, 2018, the parties reconvened for a second day of hearing, as scheduled. Tr. 128. Counsel for the Employer again indicated that the Employer would not be presenting any evidence, unless either the LAPD or the IAMAW appeared at the hearing in response to the Employer's subpoenas. Tr. 131. Counsel for the Employer also stated that the Employer had, that morning, served additional subpoenas on the LAPD, and was arranging for delivery of additional subpoenas to the additional individuals associated with the Union's organizing campaign that the Employer had learned of during the first day of hearing.[5] Tr. 131, 134; E. Exs. 6-9. The Hearing Officer requested that Counsel for the Employer make another offer of proof regarding the Employer's additional subpoenas. Tr. 132. In response, Counsel for the Employer explained that the new subpoenas prepared by the Employer sought similar information to the subpoenas that the Employer had previously issued, but expanded upon those requests based upon new information – namely, the identities of additional individuals involved with the Union's organizing campaign – revealed by the Union's subpoena responses and Mendoza's testimony on the first day of the hearing. Tr. 132-136, 137. Counsel for the Employer again explained that the new subpoenas would produce responses that would bear directly upon whether the employees of the Employer were directly affected by, or had knowledge of, the police reports being

[5] Specifically, the Employer had prepared, and was arranging to serve, subpoenas to individuals named Joe Solis, Pieter Clayton, and Cristian Murguia. E. Exs. 7-9.

filed. Tr. 132-136, 137. After returning from consultation with the Regional Director, the Hearing Officer ruled that the Region would not enforce the new subpoenas that the Employer had served on the LAPD, nor would the Hearing Officer keep the record in the case open so that the Employer could serve, and receive responses to, the rest of the subpoenas that it had drafted the previous night. Tr. 151-152, 155-156. Immediately thereafter, the Hearing Officer closed the record. Tr. 159.

The Hearing Officer's Report

On February 6, 2018, the Hearing Officer issued her Report, recommending that the "Employer's objection [No. 2] be overruled in its entirety and that an appropriate certification issue." Report 1. The Hearing Officer found that "the Employer did not present any testimonial evidence regarding the police reports or conversations with unit employees regarding police reports." Report 4. In addressing the Employer's subpoenas to the LAPD and the IAMAW, the Hearing Officer noted that the Regional Director had "determined that the subpoenaed documents / testimony were not necessary for a determination of the issue because the subpoenaed documents / testimony would not show whether the alleged conduct affected unit employees, and because the Employer made no offer of proof as to why it believed any such probative documents / testimony would be revealed by the subpoenas." Report 4, FN 4. Furthermore, the Hearing Officer stated that

she had made an "independent decision" to close the hearing without receipt of the subpoenaed documents "because the Employer failed to present any facts or offer of proof, or introduce any evidence, that would directly or inferentially support an assertion that the subpoenas would reveal any probative evidence regarding whether unit employees in the location at issue had any knowledge of the alleged conduct." Report 4-5, FN 4. Finally, Hearing Officer concluded with her belief that the Employer could have obtained "the same evidence, if not more complete and better evidence from its own employees and Site Managers", and relied upon this finding as the basis for drawing an adverse inference based upon the fact that those individuals were not called by the Employer. Report 5, FN 4. The Hearing Officer thus concluded that "the record evidence here does not support sustaining the Employer's objections and setting aside the election", and recommended that "Objection 2 be overruled and that a Certification of Representative be issued to the Union." Report 5, 6.

The Employer's Exceptions

On February 20, 2018, the Employer filed timely Exceptions to the Hearing Officer's Report, accompanied by a Brief in Support of the Employer's Exceptions (hereafter, the "Exceptions"). The Employer argued that the rulings made by the Regional Director and the Hearing Officer during the hearing on Objection No. 2 prevented the Employer from presenting significant evidence regarding both the

Union's involvement in the filing of police reports concerning the Employer or the Employer's employees, and the impact of the police reports, whether they directly involved the Employer's employees or not, on the Employer's employees. Exceptions 18-36. First, the Employer argued that the Regional Director transgressed her authority and erred by denying enforcement of the Employer's subpoenas, even though the record clearly illustrated that the information sought by the subpoenas was material to the Employer's case, and the subpoenas were not contrary to any law or the Act.[6] Exceptions 19-26. Next, the Employer argued that the Regional Director erred and abused the Region's authority by construing the General Counsel of the Board's power to deny enforcement of the Employer's subpoenas as authority on the part of the Region to rule *sua sponte* upon the relevance and timeliness of the Employer's subpoenas, as though those issues had been before the Regional Director *via* petitions to revoke. Exceptions 27-30. Finally, the Employer illustrated that the Hearing Officer relied upon the Regional Director's denial of enforcement, and her misguided findings regarding relevance and timeliness, as grounds to close the record, contrary to the Board's rules and precedent. Exceptions 30-34. As a result, the Employer argued that the Hearing

[6] The Employer also argued that the Regional Director and the Hearing Officer erred by not recognizing the Board's obligation to pursue the evidence of unlawful conduct sought by the Employer's subpoenas, even if the violation was not a violation of the National Labor Relations Act. Exceptions 26-27.

Officer's conclusions concerning whether sufficient evidence supported Employer's Objection No. 2 should be rejected, as they were based upon an incomplete record, the record in the case should be re-opened so that the Employer's subpoenas could be enforced. Exceptions 36.

The Regional Director's Certification Decision

Thereafter, on March 14, 2018, the Regional Director issued her Certification Decision, responding to the Hearing Officer's Report and the Employer's Exceptions thereto. The Regional Director first held that the record from the hearing on Objection No. 2 did not support sustaining Objection No. 2. Certification Decision 3. The Regional Director's holding was based in part upon the fact that the Employer did not present any documents or testimony regarding the alleged false police reports, including testimony from the Employer's Site Managers and employees, as set forth in the Employer's Offer of Proof, which had accompanied the Employer's Objections. [7] Certification Decision 4.

Next, the Regional Director addressed the Employer's contention that the Employer's subpoenas should have been enforced, holding that the Employer had failed to make an offer of proof that the subpoenas would "produce probative

[7] While the Regional Director held that the Hearing Officer's finding of an adverse inference based upon the Employer's decision not to call the Site Managers named in the Employer's Offer of Proof was "appropriately" drawn, the Regional Director found it "unnecessary to pass upon" the adverse inference, where the Employer had not presented any testimonial or documentary evidence during the hearing. Certification Decision 5.

evidence regarding the alleged false police reports and knowledge of the same by the bargaining unit employees at issue." Certification Decision 6. The Regional Director held that there was an "insufficient basis" to seek enforcement of the Employer's subpoenas, because the Employer's offers of proof were insufficient, because the Employer did not present additional, separate evidence "from another source" concerning the false police reports, because the Employer did not call the Site Managers and employees referenced in the Employer's Offer of Proof, and because the Employer's additional subpoenas would have been "duplicative" of the subpoenas answered by Mendoza and the Union. Certification Decision 9-10. The Regional Director also described the Employer's subpoenas as a "fishing expedition", because "the record evidence provides no basis upon which [to] reasonably believe that the desired documents contain evidence of [misconduct]." Certification Decision 9, *quoting* Millsboro Nursing, 327 NLRB 879 (1999). For all these reasons, the Regional Director maintained her ruling that she would not seek enforcement of the Employer's subpoenas. Certification Decision 10-11.

The Regional Director's Certification Decision next addressed the Hearing Officer's decision to close the record in the hearing, despite the Employer's outstanding subpoenas. Certification Decision 11. First, the Regional Director claimed, contrary to the Employer's assertions, that the sole reason the Hearing Officer kept the record open for a second day of hearing was in case the Employer

decided to present any witnesses, outside those who had been subpoenaed. Certification Decision 10. Next, the Regional Director held that, "because I properly concluded that I would not seek enforcement of the subpoenas, there was no reason to keep the record open any longer than it had been kept open". Certification Decision 11. The Regional Director's Certification Decision did not in any manner address the Employer's subpoenas scheduled to be served on the second day of hearing. Accordingly, the Regional Director found "all of the Employer's exceptions related to this issue are without merit", overruled the Employer's Objection No. 2, and certified the Union as the collective bargaining representative of the bargaining unit. Certification Decision 11-12.

Argument

The Regional Director's Partial Decision

Objection No. 1

The Regional Director's Partial Decision first errs in its analysis of the alleged affiliation between the Union and the IAMAW. In the Partial Decision, the Regional Director claimed that the Employer had presented insufficient proof to establish an affiliation between the Union and the IAMAW. Partial Decision 2. In this regard, the Partial Decision's logic ignores both Board precedent, which supports findings of affiliation, and the Employer's Offer of Proof. In support of her bare assertion that the Employer's Offer of Proof was insufficient to establish

an affiliation between the Union and the IAMAW, the Regional Director provides no explanation of the Offer of Proof's insufficiency, and cites to no precedent in support thereof. The omission is glaring, in light of the concrete evidence of affiliation presented by the Employer's Offer of Proof. See Offer of Proof 3.

Next, the Regional Director relies upon Midland Nat'l. Life Ins. Co., 263 NLRB 127 (1982) for the proposition that, even if the Employer's Offer of Proof did establish evidence of an affiliation between the Union and the IAMAW, that evidence would be insufficient to set aside the election, where there was no evidence of forgery or misuse of the Board's election process. Partial Decision 2. The Regional Director's reliance upon the standard set forth by Midland is misplaced, in part because Midland does not involve a question of undisclosed affiliation, and additionally because the rationale set forth by Midland was disapproved by the United States Court of Appeals for the Eleventh Circuit in Certainteed Corp. v. NLRB, 714 F.2d 1042 (11th Cir. 1983). [8] However, even if

[8] Importantly, the Eleventh Circuit held in Certainteed Corp. that the Board, and by extension, the Regional Director, "lacks discretion to deny a hearing to a losing party that supplies *prima facie* evidence raising substantial and material claims which, if ultimately proven true, would warrant setting the election aside." Certainteed Corp., 714 F.2d at 1048, *citing* Gulf Coast Automotive Warehouse Co. v. NLRB, 588 F.2d 1096, 1098 (5th Cir. 1979). The Eleventh Circuit went on to hold that the misrepresentations present in Certainteed were "material", and did warrant an evidentiary hearing, because the employer had no opportunity to respond to the misrepresentation during the organizing campaign, regardless of the questions of forgery or misuse of the Board's processes. Certainteed Corp., 714 F.2d at 1050. Similarly, in the case at bar, the Union's material misrepresentation,

applicable, the Midland standard cited by the Regional Director required the Regional Director to set Employer's Objection No. 1 for hearing. Midland contemplates that a misrepresentation that involves forgery or abuse of the Board's processes could warrant the setting aside of the election results. Midland at 131-133. The Regional Director erred by failing to recognize that the misrepresentation alleged by the Employer in this case – the omission of the affiliation – did involve abuse of the Board's processes. Specifically, the Union's distribution, collection, and submission of authorization cards to employees that did not disclose the Union's affiliation with the IAMAW was an abuse of the Board's "showing of interest" process, by which the Board determines whether it is appropriate to hold an election in a specified unit. See Nelson Chevrolet Co., 156 NLRB 829 (1966). In a related vein, it was a further abuse of the Board's processes for the Union to represent to employees and the Board that it would be the Union, rather than the Union as affiliated with IAMAW, who would be representing employees, by including only the name of the Union on the Board's election ballots. Thus, pursuant to the Midland standard relied upon by the Regional Director, there are at least two potential abuses of Board processes that should have prompted the

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by omission, of its affiliation with IAMAW was a misrepresentation to which the Employer was unable to respond during the organizing campaign, as the affiliation did not first come to light until the day of the election, when an IAMAW representative attended the election and tally of ballots, and advised the Union's representatives in connection with the election proceedings.

Regional Director to permit the Employer to substantiate its Offer of Proof with a full evidentiary hearing on Objection No. 1.

Finally, the Partial Decision claims that, even if the affiliation had been proven, there was no evidence of employee confusion that would warrant setting aside the election, pursuant to The Humane Soc'y for Seattle / King County, 356 NLRB 32 (2010). The Regional Director's analysis fails to distinguish the fact that, in the case at bar, the affiliation was not known to the Employer, and presumably was not known to employees, at any point in time during the organizing campaign before the day of the election. Accordingly, the fact that there is no evidence of employee confusion does not mean that employees would not be confused to learn that the Union they had voted for or against was affiliated with IAMAW – this evidence would necessarily have to be adduced at a hearing. To the contrary, the fact that the affiliation was unknown illustrates only that the Union's misrepresentation by omission was so pervasive as to raise a genuine question of fact with regard to whether employees had any idea whatsoever that they were voting to be represented by the Union, as an entity closely affiliated with the IAMAW. Accordingly, there was no evidence in the Offer of Proof which supported the Regional Director's conclusions regarding Objection No. 1, and the case law illustrates that Objection No. 1 should have been set for hearing.

Objection No. 3

The Regional Director's analysis of Employer Objection No. 3 is similarly flawed. In connection with Objection No. 3, the Regional Director claimed that the Board Agent is not required by the Board's Casehandling Manual to designate a "no-electioneering" zone. Partial Decision 4. However, even if the Board Agent is not required to designate a "no-electioneering zone", the case law cited by the Regional Director in her Partial Decision illustrates that, whether a "no-electioneering zone" is specifically designated by the Board Agent or not, the Board Agent retains a duty to police the area "at or near the polls" in order to apply "the Board's strict rules against electioneering." Bally's Park Place, Inc., 265 NLRB 703 (1982), *citing* Milchem, Inc., 170 NLRB 362 (1968); Claussen Baking Co., 134 NLRB 111 (1964); See Also, Pearson Education, Inc., 336 NLRB No. 92 (2001). Areas employees must pass to vote, or where employees would wait in line to vote, have commonly been found by the Board to constitute part of the area "at or around the polls" where the Board's rules against electioneering apply, and must be enforced. Pearson Education, Inc., 336 NLRB No. 92, 2 (2001); Fieldcrest Cannon, Inc., 318 NLRB 470, 566 (1995).

In the case at bar, despite citing this very precedent, the Regional Director's ruling ignores the Employer's Offer of Proof, which makes clear that the Board Agent not only did not designate a "no-electioneering" zone, but furthermore, **did not police** the area at or around the polls during the election, including the area

immediately adjacent to the polling area, just outside the door to the conference room where the election was held. Offer of Proof 8. The Employer's Offer of Proof offered concrete evidence of the fact that the occupants of the conference room could not observe any of the activity occurring in the hallway immediately outside the room, through which employees certainly would have had to pass in order to vote, and where voters would potentially have queued to vote. Offer of Proof 8. Accordingly, because the Employer's Offer of Proof raised a genuine question of fact as to whether the Board Agent's failure to **either** designate and police a "no-electioneering" area immediately adjacent to the polling place affected the outcome of the election, the Employer's Objection should have been set for hearing, and additional evidence related thereto should have been developed.

Objection No. 4

Employer's Objection No. 4 requires the Board to revisit an important policy determination regarding the Board's challenged ballot procedure. Despite the Board's long-held insistence that employees are entitled to the secrecy of their vote in representational elections, in the case at bar, the Regional Director's Partial Decision accepts as a harmless an admitted "procedural irregularity" [9] that an

[9] In a related vein, while the Regional Director's Partial Decision additionally relied upon the fact that the Board Agent's conduct did not affect the outcome of the election, because the challenged ballot was not determinative, this reasoning ignores Board precedent, which holds that, even where the outcome of the election is not demonstrably affected by the improper actions of the Board Agent, the

employee who voted subject to challenge in the instant case was not only not apprised of the possibility the nature of his vote would become known, but was instead explicitly reassured by the Board Agent that his challenged vote would remain confidential. Relying in part upon J.C. Brock Corp., 318 NLRB 403 (1995), the Regional Director claimed that this starkly inaccurate representation by the Board Agent did not "raise a reasonable doubt as to [the] fairness and validity" of the election. Partial Decision 5. However, as the Board noted in J.C. Brock Corp., one of the important policy considerations underlying the determination of fairness and validity is whether a Board Agent's error would create doubts about the fairness of the election process in the minds of voters. J.C. Brock Corp. at 403, *citing* Paprikas Fono, 273 NLRB 1326 (1984); See Also, Jakel, Inc., 293 NLRB 615, 616 (1989). Furthermore, key to the Board's decision in J.C. Brock Corp. was the fact that, despite the Board Agent's error, the secrecy of the employees' ballots was maintained. J.C. Brock Corp. at 404.

In the case at bar, not only was the sacrosanct secrecy of the challenged voter's ballot potentially compromised by the process, but the Board Agent lied to the employee about the possibility that the nature of his vote would become publicly known. These two issues obligate the Board to reconsider the challenged ballot process, in order to address those instances in which the current challenged

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conduct may still require the setting aside of the election if it undermines voter confidence in the process. Paprikas Fono, 273 NLRB 1326, 1328-1329 (1984).

ballot process could serve to expose the nature of challenged votes, either because all challenged voters voted either for or against representation, or because there was only one challenged ballot, as was the case here. To address and resolve this issue, the Board consider whether the challenged ballot procedure sufficiently protects all employees from having the secrecy of their votes compromised. The Regional Director's failure and / or refusal to do so in this case leads to a result wherein future challenged ballot voters' doubts about voting, and confidence in the secrecy of their ballots – and therefore confidence in the Board's election process – would all be undermined.

Secondly, the Regional Director's refusal to confront a clear error and misrepresentation by the Board Agent must be rectified. Even if the Board does not reconsider the challenged ballot process, it cannot be denied that the challenged voter in the instant case was provided patently false information about the secrecy of his vote by the Board Agent. On principle, this "procedural irregularity" requires reversal, because it is improper for the federal agency tasked with conducting fair and free elections to misrepresent the process to employees who participate in those elections. The challenged voter was entitled to truthful and accurate information about how his identity could be ascertained through the Board's challenged ballot procedure. This information would subsequently be relied upon by the challenged voter in deciding whether or not to vote subject to

challenge. Thus, by misrepresenting the process, and the potential outcome, to the challenged voter in this case, the Board Agent essentially cajoled what may have been a reticent voter into voting in the election, potentially against his will, particularly in light of the fact that the nature of his vote might become known. For all these reasons, the Board should reverse the Regional Director's ruling on Objection No. 4, reconsider the Board's challenged ballot procedure, and order a new election in light of the material misrepresentation made by the Board Agent. [10]

Objection No. 5

With regard to Objection No. 5, the Regional Director's ruling is similarly unfounded. The Regional Director concluded that the Employer's evidence of potential list-keeping by the Union's election observer was not sufficient to set aside the election because the Employer's Offer of Proof did not state with certainty that the Union's election observer was keeping a list, and did not state with certainty whether voters knew about the list. Partial Decision 6. This is precisely the evidence that would have been elicited at a hearing on Objection No.

[10] Finally, the Regional Director's reliance upon Marie Antoinette Hotel, 125 NLRB 207 (1959), is terribly misplaced. The Regional Director appears to rely upon Marie Antoinette for the proposition that a new election is not warranted due to the fact that a voter's identity became known to the parties by way of the challenged ballot procedure. This badly misunderstands the Employer's objection, which is to the very challenged ballot procedure relied upon by the Board, and to the inaccurate and untruthful statements of the Board Agent to the challenged voter – not to the nature of the challenged voter's ballot, as was the case in Marie Antoinette.

5. For the Regional Director to hold otherwise is to elevate the required content for an Offer of Proof from evidence which *potentially supports* an election objection to evidence that *incontrovertibly proves* an election objection – a standard never previously required by the Board. [11] See Also, SR-73 and Lakeside Avenue Operations LLC, 365 NLRB No. 119 (2017) (Miscimarra, dissenting). Accordingly, the Regional Director's ruling on Objection No. 5 should be vacated, and Objection No. 5 should be set for hearing, in order to grant the Employer the opportunity to present evidence to which it is entitled pursuant to the very precedent cited by the Regional Director in her Partial Decision.

Objection No. 6

In connection with Objection No. 6, which addresses the propriety of the Region conducting an election wherein the true nature of the affiliation between the Union and the IAMAW was not made clear to the employees, the Regional Director's Partial Decision simply parrots the Regional Director's rulings on Employer's Objection No. 1, which alleges that the Union's misrepresentation – by

[11] In fact, the cases relied upon by the Regional Director in order to overrule Objection No. 5 clearly illustrate that an election objection need not be anywhere near as detailed as is now claimed by the Regional Director in the instant case. For example, in Piggly-Wiggly #011, the employer's objection stated only that, union representatives "had in their possession […] a sheet of paper on which notations were being made and other writings being entered thereon." 168 NLRB 792, 792 (1967). Similarly, in Chrill Care, Inc., which was also relied upon by the Regional Director, the Regional Director set the employer's allegation of unlawful list-keeping for hearing, and permitted the employer to develop evidence in support of its claim of list-making. 340 NLRB 1016, 1016-1017 (2003).

omission – of the affiliation between the parties warranted the setting aside of the election. Partial Decision 7. The Partial Decision is thus flawed, inasmuch as Objection No. 1 and Objection No. 6 raise separate questions, subject to different standards of review by the Regional Director. The Union's misrepresentation, central to Objection No. 1, is not the central issue in Objection No. 6, which is an objection to the Board's conduct of the election, rather than to conduct by the Union which affected the outcome of the election. Thus, the Regional Director's repeated citation to Midland and the standard for party misrepresentations that it sets forth, is inapplicable to the analysis of the Board's actions.

Instead, the Regional Director's inquiry should have focused on the Board's obligation to ensure that employees' votes were not affected by the erroneous designation of the Union as the representative, without any reference to its affiliate, the IAMAW. In In re. Woods Quality Cabinetry, 340 NLRB 1355 (2003), the Board held that the Region's failure to correct notices of election and ballots that inaccurately reflected the affiliation of the union warranted the setting aside of the election. The Board held that a question of affiliation "is a material and substantial issue" that has the "potential to significantly impact the employees' choice of bargaining representative." In re. Woods Cabinetry at 1355, *citing* Nelson Chevrolet Co., 156 NLRB 829 (1966); Douglas Aircraft Co., 51 NLRB 161 (1943). Furthermore, the Board cautioned that issues concerning "the very identity

of the union" are a "significant matter" – particularly where the affiliation raises questions of assistance from another labor organization, and questions about the "autonomy or dependence" of the union. In re. Woods Cabinetry at 1356. Similarly here, the question of the Union's affiliation with IAMAW contains all the same hallmarks found troubling by the Board in In re. Woods Cabinetry. Due to the Union's failure to disclose the affiliation, and the Board's subsequent failure to conduct an election that recognized and made clear to employees this affiliation, the election should be set aside. The affiliation between the IAMAW and the Union raises all the same questions that the Board stated in In re. Woods Cabinetry that employees have the right to address: How does the IAMAW support, or take from, the Union? In what manners is the Union answerable to the IAMAW? How much autonomy, or lack thereof, exists for the Union as a result of its affiliation with the IAMAW? Employees deserved an opportunity to address these questions with the Union during the Union's organizing campaign. As a result of the Union's misrepresentation, and the resulting conduct of the election by the Board, employees were deprived of this opportunity. As a result, the election should be set aside.

Objection No. 7

In response to Employer's Objection No. 7, which alleged that the Board had erred by conducting the election in violation of Section 9(b)(3) of the Act by

permitting an election in a bargaining unit that included employees (specifically, MRI Technologists and Multi-Modality Technologists) who functioned as "guards" pursuant to Section 9(b)(3) of the Act, the Regional Director erroneously concluded that the Employer's Offer of Proof did not present sufficient grounds for setting aside the election if introduced at hearing. Partial Decision 7. First, the Regional Director claimed that the Employer "agreed", by way of the Stipulated Election Agreement, that the appropriate unit consisted of Technical employees. Partial Decision 7. The Partial Decision omits the fact that the Stipulated Election Agreement between the parties states only the parties' agreement that all eligible "Technical" employees will be included in the bargaining unit, and **specifically excludes** from that bargaining unit all "**guards […] as defined by the Act**." Certification Decision 1 (emphasis added). Furthermore, the question of whether the Employer agreed to, or objected to, the inclusion of guards in the unit does not in any way affect the Board's freestanding duty to ensure that that it does not certify any bargaining unit that includes guards with non-guard employees, pursuant to Section 9(b)(3) of the Act. See Brink's, Inc., 272 NLRB 868, 869 (1985) (Holding that the Board is precluded under Section 9(b)(3) of the Act from certifying a union that represents non-guard employees to represent a unit containing guards, and that the Board's processes may not be used "in furtherance of that end".); University of Chicago, 272 NLRB 873, 875 (1984) ("[W]e shall not,

indeed cannot, sanction a practice which utilizes Board processes in furtherance of an end which a specific provision of the Act was plainly intended to discourage.").

Next, the Regional Director asserted that, even if the Section 9(b)(3) issue was properly before her, the evidence contained in the Employer's Offer of Proof was insufficient to establish that the MRI Technologists and Multi-Modality Technologists would be considered guards, pursuant to Section 9(b)(3) of the Act. Partial Decision 7. The Regional Director's holding is entirely arbitrary where, when presented with virtually the identical offer of proof in the context of the representation proceedings that preceded the parties' signing of the Stipulated Election Agreement in this case, the Regional Director reached the exact opposite conclusion, holding that the same offer of proof as was presented here contained sufficient evidence of the potential guard status of MRI Technologists and Multi-Modality Technologists to set the issue for hearing in the representation case. See Representation Case 31-RC-208646, Employer's Exhibit 1; Representation Case 31-RC-208646 Tr. 36, 38-41, 45, 47-48, 50-51. This history also undermines the Regional Director's *post hoc* attempts to criticize the Employer's Offer of Proof as lacking in specificity – this same concern did not discourage the Regional Director from finding the same Offer of Proof, containing the same evidence, sufficient to set the issue for hearing in a prior proceeding. Furthermore, nothing about the Employer's Offer of Proof lacked specificity – to the contrary, the Offer of Proof

very clearly delineates the specific guard duties possessed by the Technologists, including how they are carried on a daily basis and in the event of an emergency. See Offer of Proof 12-13. Similarly, the Regional Director's assertion that the Employer's Offer of Proof did not include evidence of what would actually happen in the event of a "hazardous malfunction" is belied by the Employer's Offer of Proof, which clearly states that the Technologists possess the authority to take action in such circumstances.[12] See Offer of Proof 12-13. Again, the Regional Director has misunderstood her objective, which was to determine whether, if the evidence in the Employer's Offer of Proof was proven, it would establish guard status. Based upon this standard, rather than parsing the evidence contained in the Employer's Offer of Proof, the Regional Director should have permitted the Employer an opportunity to develop that evidence in a hearing.

[12] Similarly, the Partial Decision takes issues with the fact that the Employer's Offer of Proof did not state an intention on the part of the Employer to call any employees to testify regarding their guard job duties, but rather to call the Employer's Medical and Health Physicist to explain the Technologists' role. Partial Decision 8. The Regional Director's duty was to rule upon whether, if the Employer's Offer of Proof was indeed proven at hearing, the evidence would be sufficient to establish that the Technologists were guards. Should the Union or the Hearing Officer believe, for some reason, that the evidence provided by the Employer's chosen witness was inaccurate or would be contradicted by the Technologists themselves, other individuals could be called to testify in an evidentiary hearing. However, the fact that the Employer's Offer of Proof does not state an intention on the part of the Employer to solicit its evidence from an actual Technologist was not a sound ground upon which to overrule the Employer's Objection.

Additionally, the Regional Director's analysis of the evidence contained in the Employer's Offer of Proof is flawed. The Regional Director begins and ends her analysis with the defective assertion that the Employer's Offer of Proof suggests that the MRI Technologist and Multi-Modality Technologist guard duties are "incidental" to their other duties. Partial Decision 7, 8. To the contrary, the Employer's Offer of Proof clearly establishes that the Technologists guard duties were central to many aspects of their daily job duties, such as permitting and denying entry to the two dangerous zones surrounding the MRI machine, and policing all persons and materials that enter those areas. See Offer of Proof 12-13. Furthermore, the Regional Director seems to confuse the concept of "incidental" job duties with the concept that employees who are guards may still possess non-guard job duties that they perform on a daily basis. See Brinks, Inc., 272 NLRB at 868-869 (Coin room operators, who possessed other job duties beyond their guard functions, still met the definition of "guard" set forth by Section 9(b)(3) of the Act); Reynolds Metal Co., 198 NLRB 120 (1972) (Firefighters found to be guards even if only approximately 25% of their time on duty is spent performing guard duties); Wackenhut Corp., 196 NLRB 278 (1972) (Security toll operators were found to be guards, despite the fact that they had other job duties outside their guard functions). Thus, the thrust of Regional Director's analysis of guard status was flawed, as the evidence contained in the Employer's Offer of Proof clearly

illustrated that the Technologists would have met the definition of guards set forth by 9(b)(3) of the Act, had the Regional Director set Objection No. 7 for hearing. [13]

Finally, the Regional Director's claim that the Employer's Offer of Proof did not suffice to establish that MRI Technologists and Multi-Modality Technologists might be classified as guards pursuant to Section 9(b)(3) of the Act because the Offer of Proof did not include evidence of the employees' divided loyalties in the event of the strike ignores precedent – both the long-standing precedent of the Board, and the prior, recent precedent of the Regional Director herself. Though it is true that the United States Court of Appeals for the Sixth Circuit originally relied upon the "divided loyalties" rationale in NLRB v. Jones & Laughlin Steel Corp., 154 F.2d 932 (6th Cir. 1946), the Board has since noted that "Section 9(b)(3) […] is not limited to the divided loyalty situation […] but is broader." International Harvester Co., 154 NLRB 1747, 1750 (1964). As pointed out by the Board in International Harvester, the Board's precedent has not been primarily concerned with "whether the guards would be faced with a conflict of interest or loyalty at their particular plant", but rather "only with whether there was such an affiliation" between guard employees and a non-guard union, in determining whether the Board can certify such a bargaining unit. Id.

[13] For some inexplicable reason, the Regional Director's analysis also focused specifically on the fact that the Technologists are not tasked with protecting the Employer from theft, which has never been held by the Board to possess talismanic importance to the inquiry into guard status pursuant to Section 9(b)(3) of the Act.

Similarly, the precedent of the Regional Director herself illustrates that her focus on divided loyalties was arbitrary, in light of her prior decisions on guard status. Specifically, in DTG Operations, Inc., 31-RC-175375 (June 2, 2016), the same Regional Director addressed the question of whether Exit Gate Agents employed by Dollar Thrifty, a car rental company, were guards, pursuant to Section 9(b)(3) of the Act. The Regional Director found that the Exit Gate Agents were indeed guards as defined by the Act. [14] There is also no evidence in the DTG Operations, Inc. decision issued by the Regional Director that either party to the proceedings introduced evidence regarding the Exit Gate Agents' divided loyalties in the event of a strike, and the Regional Director's decision makes absolutely no mention whatsoever of the question of divided loyalties that she now claims are so vital to her determination of guard status in the instant case. Thus, the Regional Director's own recent precedent illustrates that the question of divided loyalties is far from dispositive of the question of guard status, and furthermore proves that the

[14] Also notable is the fact that, as in the case at bar, the evidence before the Regional Director in DTG Operations, Inc. illustrated that Exit Gate Agents possessed job duties that had nothing to do with their guard functions, such as tracking vehicle inventory and selling upgrades to customers. Id. at 5. The evidence further illustrated that the Exit Gate Agents did not complete security rounds, did not carry weapons, possessed no special identification as security personnel, and were not expected to use physical force to carry out any security functions of their jobs. Id. at 6. Despite the similarity between the job duties of Exit Gate Agents and the Technologists in the case at bar, the Regional Director arbitrarily ruled that there was not even sufficient evidence to set the Employer's Objection No. 7 for hearing.

Employer in the instant case was entitled to an opportunity to develop its evidence of the guard status of MRI Technologists and Multi-Modality Technologists in a hearing.

Objection No. 8

Finally, in connection with Objection No. 8, the Employer's objection to the Board's conduct of the election pursuant to the Board's revised election rules, the Regional Director held that the Employer's stated objections to the Board's revised election rules did not constitute grounds for setting aside the election.[15] Partial Decision 9. The Regional Director erroneously claimed that, if Employer's Objection No. 8 was not waived, the Employer's objections to the Board's revised election rules had been "successfully litigated to conclusion by the Agency in federal court". Partial Decision 10. First, the Regional Director's claim is not accurate, inasmuch as the cases cited by the Regional Director did not foreclose the possibility that the Board's revised election rules might be invalid as applied in future cases. See Associated Builders & Contractors of Texas, Inc. v. NLRB, No. 1-15-CV-026 RP, 2015 WL 3609116; Chamber of Commerce of the United States

[15] Again, the Regional Director first erroneously relied upon a claim that the Employer had waived the right to object the Board's election rules by signing a Stipulated Election Agreement, and by not objecting the Board's reliance upon its revised election rules in prior proceedings before the Region. Partial Decision 9. The Employer did not waive its right to object to the Board's revised election rules by signing the Stipulated Election Agreement, particularly where, as here, the Employer timely filed an objection to the election challenging the Board's revised election rules.

v. NLRB, 118 F.Supp.3d. 171 (D.D.C. 2015). As the Employer's Offer of Proof made clear, the Employer's Objection raised not only the facial invalidity of the Board's revised election roles, but also set forth the Employer's intention to challenge the Board's revised election rules as applied in the case at bar. Offer of Proof 13-14. Contrary to the Regional Director's ruling, the Employer's "as-applied" challenges were in no way foreclosed by the above-cited decisions.

Furthermore, the Regional Director's analysis ignores the Board's recent request for information from the public regarding the Board's revised election rules, with specific focus on whether the revised election rules should be maintained, modified, or rescinded in their entirety. 29 CFR §§101, 102, RIN 3142-AA12. The Board's request for information raises the Board's concerns with the "significant issues concerning application" of the Board's revised rules that have arisen over the course of the two years during which the revised election rules have been in place, illustrating that the Board itself is still considering whether the Board's revised election rules are appropriate and lawful. Id. at 2. Accordingly, the Regional Director's perfunctory dismissal of the Employer's challenges to the legality of the Board's revised election rules, as though they raised no cognizable argument, should be vacated, and the Employer should be presented with an opportunity to present its arguments regarding the legal issues confronting the

Board's revised election rules, both on their face and as applied in the case at bar, to the Region and to the Board.

The Regional Director's Certification Decision

Denial of Enforcement of the Subpoenas

Moving next to the Regional Director's Certification Decision, which deals in substance only with Employer's Objection No. 2, the Regional Director first erred by upholding her prior decision, made during the hearing on Objection No. 2, to deny enforcement of the subpoenas issued by the Employer to the LAPD, the IAMAW, and certain known agents of the IAMAW and the Union. The Regional Director's Certification Decision claims that the Employer was "given numerous opportunities to make offers of proof regarding the basis" for the Employer's belief that the subpoenas were relevant to the hearing on Objection No. 2, and that the Employer failed to provide an adequate response. Certification Decision 6, 8. Contrary to the Regional Director's assertions, the Employer responded to the Hearing Officer's many, repeated requests for offers of proof by the Employer by consistently delineating the specific evidence sought by the Employer's subpoenas, and the relevance of that evidence to the central question in the hearing on Objection No. 2 – whether the Employer's eligible voters were aware of false police reports filed against other employees of other affiliated facilities, and / or whether the eligible voters themselves had been subjected to false police reports

during the course of the Union's organizing campaign. See Tr. 12-13, 17, 19, 121, 125-126, 33-34, 35, 38-41, 48, 134. The repeatedly articulated basis for the Employer's belief that such evidence would be yielded by the Employer's subpoenas was the filing of a number of false police reports during the Union's organizing campaign, as was also explained by the Employer's offers of proof. See Tr. 12-13, 17, 19, 121, 125-126, 33-34, 35, 38-41, 48, 134. Thus, the evidence illustrates that, in the Certification Decision, the Regional Director required a higher standard be proven by the Employer's offers of proof than has ever previously been required by the Board to warrant enforcement of the Employer's subpoenas. Specifically, the Board's rules require that the Employer's subpoenas be enforced "unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with the law and with the policies of the [National Labor Relations] Act." NLRB Rules & Regulations §102.31(d). This standard was certainly met by the Employer's subpoenas, as explained by the Employer's offers of proof, and thus the Employer's subpoenas should have been enforced by the Regional Director. [16]

[16] The Employer's offers of proof also contradict the Regional Director's conclusion that the Employer's subpoenas to the LAPD would have "at most, established that police reports were made". Certification Decision 9. To the contrary, as is clear from the face of the subpoenas themselves, and as further explained by the Employer in the course of its many offers of proof, the subpoenas to the LAPD would have established whether the eligible voters of the Employer were themselves subjected to any harassing police reports during the course of the

The Regional Director next applied circular logic to support her decision to deny enforcement of the Employer's subpoenas, claiming that, because the Employer did not present any evidence during the hearing that eligible voters were aware of the alleged false police reports, the Employer should be prevented from developing evidence, *via* subpoena enforcement, that eligible voters were aware of the alleged false police reports. Certification Decision 8. Pursuant to the Regional Director's nonsensical standard, no party would ever be entitled to subpoena enforcement unless they could present separate and distinct evidence of the very facts they wished to establish by presentation of the subpoenaed evidence.[17] The Regional Director's analysis of subpoena enforcement is therefore a virtual no-win for any party seeking enforcement, because every employer will be maligned for either having both too little evidence to support subpoena enforcement, or too much evidence to support subpoena enforcement. This impossible standard is surely not what the Board intended when it established that a party's subpoenas would be enforced in all but the narrowest of parameters, and therefore the

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Union's organizing campaign. See E. Exs. 4, 6; Tr. 18-20, 48-49, 133. This evidence bears obvious facial relevance to the question of whether employees of the Employer were free to exercise their rights without harassment, coercion, fear or intimidation during the election, as evidence of employees being subjected to repeated police reports proves, on its face without further corroborating evidence, that a free and fair election environment was not maintained.

[17] In that event, pursuant to the Regional Director's logic, the subpoenas should not be enforced because the evidence was available from another source. See Certification Decision 8.

Regional Director's analysis and conclusions regarding subpoena enforcement cannot stand.

As noted above, the Regional Director's Certification Decision not only punished the Employer for having too little evidence to support enforcement of its subpoenas, but also alleged that the Employer was not entitled to subpoena enforcement because it had access to *too much* evidence. Certification Decision 8. As Chairman Miscimarra pointed out in his dissent to SR-73 and Lakeside Avenue Operations LLC, "it is not grounds to refuse to enforce a subpoena that the party serving the subpoena might have been able to obtain the information it seeks through other means. […] This reasoning disregards that a subpoena duces tecum is a statutorily authorized means through which parties to a Board proceeding may determine whether potential evidence exists, and if it does, obtain it." 365 NLRB No. 119 (2017). In connection with the Regional Director's conclusion, the Regional Director cited to the fact that the Employer's Offer of Proof in support of Objection No. 2 stated the Employer's intention to call Site Managers and employees to testify about police reports that were filed against them during the course of the Union's organizing campaign. Certification Decision 8. However, as counsel for the Employer explained during the hearing, the witnesses referenced by the Employer's Offer of Proof could not testify or otherwise present any evidence of the dissemination of information about the police reports to the employees of the

Employer, the question central to the hearing on Objection No. 2. [18] See Tr. 36-37, 47, 92-93. Thus, the Regional Director's conclusion was both factually and legally unfounded. [19] [20]

[18] The question of dissemination was not the original focus of Employer's Objection No. 2, which alleged not only that the effect of the false police reports on eligible voters warranted overturning the election results, but also that the Union and/or IAMAW's involvement with the filing of false police reports involving any employee of any affiliate of the Employer during the Union's organizing campaign in and of itself warranted that the election results be set aside, regardless of whether a direct link to the employees of the Employer was established or not. See Objections 2. Thereafter, the Regional Director's Partial Decision went on to state that the specific issue set for hearing was "whether the alleged filing of police reports 'was so aggravated as to create a general atmosphere of fear and reprisal'" as to affect the eligible voters' exercise of free choice in the election. Partial Decision 4. The limited objective of the hearing on Objection No. 2 was confirmed on multiple occasions by the Hearing Officer during the hearing. See Tr. 49-50, 80-81. Accordingly, based upon both the Regional Director and Hearing Officer's assertions of the evidence relevant to their determination, the Employer determined that it would not call the Site Managers or employees named in the Offer of Proof because they could not offer evidence concerning the dissemination of information about the false police reports to the eligible voters of the Employer. Tr. 49-50, 80-81. Thus, the record ably establishes that the evidence that could have been obtained by calling the Site Managers and employees named in the Offer of Proof would not, in fact, have provided the Employer with an alternate source of the information it had subpoenaed, as was contended by the Regional Director in the Certification Decision.

[19] Similarly, the Regional Director claimed that subpoena enforcement was inappropriate because the Employer could have called the eligible voters from the bargaining unit as witnesses in the hearing. Certification Decision 8. However, the Employer had previously expressed a concern that the employees would be uncomfortable testifying truthfully, in light of claims of harassment of employees by the Union, and thus instead sought the documentary evidence that would sustain its Objection. Tr. 91. See Also Tr. 134.

Finally, the Regional Director incorrectly characterized the Employer's subpoenas as a "fishing expedition", and refused to enforce the Employer's subpoenas on this ground. Certification Decision 9. However, the Board's precedent clearly establishes that the Employer's subpoenas did not constitute fishing expeditions. As Former Board Chairman Miscimarra explained in his dissent in SR-73 and Lakeside Avenue Operations LLC, 365 NLRB No. 119 (2017), "The purpose of a subpoena duces tecum is to determine *whether* the subpoenaed documents exist", and that "[i]t cannot be a precondition to securing subpoena enforcement that a party *knows* the subpoenaed materials exist, since the very purpose of the subpoena is to determine *whether* they exist." (emphasis in

[20] The Regional Director also claimed that the evidence sought by the Employer's subpoenas would have been duplicative of the evidence produced by the Union and Mendoza in response to the Employer's subpoenas. Certification Decision 10. The Regional Director's entirely speculative assertion is patently untrue, and is disproven by a simple review of the subpoenas themselves, which clearly establish that the Employer was seeking different documents from different individuals that would not have been in the possession of, nor produced by, the Union or Mendoza. See E. Exs. 1-9. Furthermore, the Regional Director's claim that the Employer did not make a sufficient offer of proof as to the distinction between and amongst the Employer's outstanding subpoenas and the responses provided by the Union and Mendoza is similarly belied by the record, which illustrates that counsel for the Employer aptly explained the additional documents sought by the Employer's subpoenas that were not duplicative of the responses from Mendoza and the Union. See Tr. 40-41, 82-83, 112, 136-137. Finally, the Regional Director's claim that the Employer's subpoenas, prepared for service upon Union representative Clayton and IAMAW representative Solis, were "unlikely" to produce additional relevant documents, the Regional Director's conclusion is unlawfully speculative, and based upon the assumption that, just because Solis and Clayton only attended a few of the Union's organizing meetings, they did not remain involved in the campaign in any capacity thereafter.

original). [21] Accordingly, because the Employer's subpoenas did not constitute a fishing expedition, the Regional Director's refusal to enforce the Employer's subpoenas should be overruled.

The Misapplied Standard for Subpoena Enforcement

Despite the fact that the Employer's excepted to the Regional Director's reliance upon the authority to enforce subpoenas as grounds to, in essence, revoke the Employer's subpoenas, the Regional Director did not so much as address the Employer's arguments on this point in her Certification Decision. During the hearing on Objection No. 2, and in the Employer's Exceptions to the Hearing Officer's Report, the Employer made clear that it disagreed with the Region's attempts to parlay the authority to rule on a motion to enforce the Employer's subpoenas into *de facto* authority to revoke the Employer's subpoenas. See Tr. 42-

[21] Furthermore, the subpoenas at issue in the instant case are clearly distinguishable from the subpoenas at issue in the case law cited by the Regional Director's Certification Decision. In both Burns Security Services, 278 NLRB 565 (1986) and Millsboro Nursing, 327 NLRB 879 (1999), the employer was seeking subpoenas related to defenses that the employer had not even proven "inferentially". 278 NLRB at 566; 327 NLRB at FN 2. By contrast, the Employer in the case at bar explained, *via* its offers of proof during the course of the hearing on Objection No. 2, the events that had occurred at other affiliated locations which inferentially supported the conclusion that the Employer's subpoenas would contain evidence probative to the question of the impact of the false police reports on eligible voters. Finally, in Spartan Department Stores, 140 NLRB 608 (1963), an intervenor sought enforcement of a subpoena which the Board held was cumulative, in light of the evidence already contained in the hearing record. 140 NLRB at FN 2. In the instant case, there was no evidence already contained in the record regarding the impact of the false police reports on eligible voters, so the Board's rationale in Spartan does not apply.

43, 44-46, 50, 79-80; Exceptions 27-30. Pursuant to the Board's Rules and Regulations, a petition to revoke should be granted only when "the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." NLRB Rules & Regulations, §§102.66(f); 102.69(c)(1)(3). By contrast, if a party fails to comply with a subpoena, the General Counsel of the Board "**will** […] institute enforcement proceedings in the appropriate district court, unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with the law and with the policies of the [National Labor Relations] Act." NLRB Rules & Regulations §102.31(d) (emphasis added). The Board's Rules regarding enforcement of subpoenas do not contemplate relevance or timeliness as grounds upon which enforcement should be denied. Furthermore, the Board's Rules and Regulations very clearly set forth the distinct procedures for revocation of a subpoena and enforcement of a subpoena by the General Counsel - specifically, only a party served can petition in writing to revoke the subpoena. NLRB Rules & Regulations §§102.66(f); 102.69(c)(1)(3); See Also SR-73 and Lakeside Avenue Operations LLC, 365 NLRB No. 119 (2017) (Miscimarra, dissenting).

Despite acknowledging that the Region was without authority to rule upon the revocation of the Employer's subpoenas, where no petitions to revoke had been filed, the Hearing Officer and the Regional Director essentially did just that, by misapplying the standards applicable to the revocation of the Employer's subpoenas to the analysis of revocation of the Employer's subpoenas. The Hearing Officer stated repeatedly on the record that the reasons the Employer's subpoenas were not being enforced were grounded in decisions made by the Regional Director about the relevance and timeliness of the Employer's subpoenas. Tr. 15, 30, 44-46, 150-152, 156. Thus, the record makes clear that the Regional Director's rulings on the enforcement of the Employer's subpoenas impermissibly blended the standard for enforcement with the standard for revocation. To the extent the Employer's concerns are at all addressed by the Regional Director's Certification Decision, it is only inasmuch as the Regional Director denies having relied upon relevance and timeliness as "significant factors" in the Regional Director's decision to deny enforcement of the Employer's subpoenas. Certification Decision 11. Thus, the Employer's exceptions to the Regional Director's misapplication of the stand for enforcement of the Employer's subpoenas stand unaddressed and unresolved, and require that the record in the hearing on Objection No. 2 be reopened so that the enforcement of the Employer's subpoenas can be properly analyzed pursuant to the proper legal standard.

The Premature Closure of the Record

In her Certification Decision, the Regional Director next attempts, unsuccessfully, to defend the incongruity created by the hearing record, wherein the Hearing Officer abruptly, and without explanation, reversed her decision to keep the hearing record open for receipt of additional responses to the Employer's subpoenas. The Partial Decision claims that the Hearing Officer kept the record open "to give the Employer a second day to put on evidence" and "present additional witnesses". Certification Decision 6, 10. This assertion is clearly belied by the record, which illustrates that the Employer made patently clear at the end of the first day of hearing that it would not call any new witnesses on the second day of hearing, and would only present evidence if some or all of the subpoenaed parties appeared at the hearing. See Tr. 79-80, 85-86, 88-89, 90, 99. Thus, the only reason the record in the hearing was kept open for a second day was the Hearing Officer's decision to give the subpoenaed parties additional time to respond to the Employer's subpoenas. The Hearing Officer's unexplained and arbitrary departure from her stated course is, in and of itself, evidence of arbitrary and capricious agency decision-making in violation of the Administrative Procedure Act, and should be overturned by the Board.

Furthermore, the Hearing Officer's decision to prematurely close the record, endorsed by the Regional Director in the Certification Decision, ignores the

Board's obligation to ensure the creation of a full, fair and complete record in representation proceedings. The Board's Rules and Regulations make clear that, "it shall be the duty of the Hearing Officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act." NLRB Rules and Regulations §102.64(b); See Also, NLRB Rules and Regulations §102.66(c)(1)(3); NLRB Representation Manual §11188.1. The Board's case law also supports the development of a full record. Baddour, Inc., 281 NLRB 546, FN 2 (1986); Globe-Union, Inc., 194 NLRB 1076, 1077 (1972) (Miller, dissenting). In the case at bar, far from being granted an opportunity to present its case, the Employer was foreclosed by the Regional Director's refusal to enforce the Employer's, and the Hearing Officer's premature closure of the record, from presenting any of the evidence it sought by way of its subpoenas issued to the LAPD, the IAMAW, Carrillo, Solis, Clayton, and Murguia.[22] The premature closure of the record in this case very clearly prejudiced the Employer, inasmuch as the Regional Director relied heavily on the lack of record evidence – which

[22] Notably, because the Employer had not even yet had the chance to issue subpoenas to Solis, Clayton, and Murguia, the Regional Director had not ruled upon the enforcement of those subpoenas at the time the Hearing Officer closed the record. The Region's haste is particularly troubling where, as here, the Employer could not possibly have prepared and served subpoenas on these parties any faster than it did, given that the identities of the parties were not known until after Mendoza testified on the first day of the hearing. See Tr. 86.

would have come into the hearing in response to the Employer's subpoenas – as the basis upon which she relied in overruling Employer's Objection No. 2. Because the Regional Director's Certification Decision improperly endorsed the Hearing Officer's premature closure of the record, in violation of the Board's Rules, the Board's precedent, and the Hearing Officer's own prior ruling to the contrary, the record in this case should be re-opened in order to provide the Employer the full and fair opportunity to present its case regarding Objection No. 2 as is required. [23]

The Regional Director's Factual Findings

Finally, as a result of the Regional Director's improper and misguided refusal to enforce the Employer's subpoenas, combined with the Regional Director's endorsement of the Hearing Officer's premature closure of the record, the Employer was completely and entirely prevented from presenting its *prima facie* case on Objection No. 2 to the Regional Director, and the Regional Director's factual findings in her Certification Decision are thus based upon an incomplete

[23] As a related matter, the Regional Director's Certification Decision dispensed without fanfare of the Employer's assertion that the Board retains an obligation to investigation potential violations of the law, denying any such responsibility and faulting the Employer for failing to cite any authority for its proposition. Certification Decision 11. However, the Board's own guidance clearly illustrates that the Board does have an obligation to ensure parties' compliance with other laws. See, *e.g.*, General Counsel Memorandum OM 07-27 at 6 (December 27, 2006) (Confirming Board's responsibility to "correctly apply" federal laws, including those other than the Act.).

record. The Regional Director's determination that the Board's standard for setting aside the election had not been met in the case at bar was based upon the Regional Director's repeated reference to the fact that the Employer had not presented any evidence or testimony to support Objection No. 2.[24] Certification Decision 4, 5. The Regional Director's conclusion is, of course, the direct result of the Regional Director's prior rulings denying enforcement of the Employer's subpoenas, and the Hearing Officer's premature closure of the record. Had the Employer's subpoenas been enforced, and had the record remained open, the Employer would have been able to present significant testimonial evidence, and potentially also documentary evidence, in support of Objection No. 2. Because of the prejudicial actions of the Regional Director and the Hearing Officer that the Employer was prevented from presenting evidence in the hearing – a fact erroneously relied almost exclusively upon by the Regional Director in overruling Objection No. 2.

Conclusion

For all the reason expressed herein, the Employer respectfully requests that the National Labor Relations Board grant the Employer's Request for Review and

[24] The Regional Director's Certification Decision also made much of the fact that the Employer did not ask Mendoza about her communications with eligible voters concerning false police reports, ignoring the fact that the Employer was awaiting receipt of subpoenaed documents about which it intended to question Mendoza in relation to the dissemination of information about the false police reports to eligible voters. See Certification Decision 4, 7.

vacate the Certification Decision issued by the Regional Director, so that the Employer's Objections and Exceptions may be reconsidered, and the Employer may be granted an opportunity to present a full and fair record regarding all of its Objections to the December 6, 2017 election.

Dated: Mount Pleasant, South Carolina
March 28, 2018

Respectfully Submitted,

____/s/_____

Kaitlin A. Kaseta, Esq.
Counsel for the Employer
415 King Street
Mount Pleasant, SC 29464
(860) 307-3223
(843) 284-9684
kkaseta@carmodyandcarmody.com

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 31

RADNET MANAGEMENT, INC. D/B/A SAN FERNANDO VALLEY RADIOLOGY AND IMAGING CENTER	:	31-RM-209388
and	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	

CERTIFICATE OF SERVICE

The Undersigned, Kaitlin A. Kaseta, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the Employer's Request for Review of the Regional Director for Region 31's January 12, 2018 Partial Decision on Objections and March 14, 2018 Decision and Certification of Representative was e-filed with both the Office of the Executive Secretary and Region 31 on this date through the website of the National Labor Relations Board (www.nlrb.gov). The Undersigned does hereby further certify that a copy of the Employer's Request for Review of the Regional Director for Region 31's January 12, 2018 Partial Decision on Objections and March 14, 2018 Decision and Certification of Representative were served this date upon the following by email:

Florice Hoffman
Law Office of Florice Hoffman, L.C.
8502 E. Chapman Avenue, Suite 353
Orange, CA 92869-2461

fhoffman@socal.rr.com

Dated: Mount Pleasant, South Carolina
March 28, 2018

Respectfully Submitted,

____/s/_____
Kaitlin A. Kaseta, Esq.
Counsel for the Employer
415 King Street
Mount Pleasant, SC 29464
(860) 307-3223
(843) 284-9684
kkaseta@carmodyandcarmody.com